



**DEPARTMENT OF DEFENSE
DEFENSE OFFICE OF HEARINGS AND APPEALS**

In the matter of:)
)
-----) ISCR Case No. 17-04007
)
)
Applicant for Security Clearance)

Appearances

For Government: Adrienne Driskill, Esquire, Department Counsel

For Applicant: *Pro se*

May 2, 2019

Decision

ROSS, Wilford H., Administrative Judge:

Statement of the Case

Applicant submitted an Electronic Questionnaire for Investigations Processing (e-QIP) on January 22, 2017. (Government Exhibit 1.) On December 21, 2017, the Department of Defense Consolidated Adjudications Facility (DoD CAF) issued a Statement of Reasons (SOR) to Applicant, detailing security concerns under Guideline H (Drug Involvement and Substance Misuse). The action was taken under Executive Order 10865, *Safeguarding Classified Information Within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive); and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position*, effective within the Department of Defense on June 8, 2017.

Applicant answered the SOR in writing (Answer) on January 18, 2018, and requested a hearing before an administrative judge. Department Counsel was prepared to proceed on January 31, 2018. The case was assigned to me on February 6, 2018. The Defense Office of Hearings and Appeals (DOHA) issued a Notice of Hearing on March 9, 2018. I convened the hearing as scheduled on May 1, 2018. The Government offered Government Exhibits 1 and 2, which were admitted without objection. Applicant testified on his own behalf. DOHA received the transcript of the hearing (Tr.) on May 8, 2018.

Findings of Fact

Applicant is a 47-year-old employee of a defense contractor involved in technical sales. He is married with two children, and has a Master's degree. He has worked for his employer since 1999, and is seeking to obtain national security eligibility for a security clearance in connection with his work with the DoD.

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The Government alleges in this paragraph that Applicant is ineligible for clearance because he has used illegal drugs. Applicant admitted allegations 1.a and 1.b under this paragraph. He denied allegation 1.c.

1.a and 1.b. Applicant used marijuana once or twice a month from approximately 1990, when he was in high school, until December 2017, after Applicant received the SOR. During that entire period he would purchase marijuana once or twice a year, ending in June or July 2017. He bought it from friends, and eventually from a marijuana dispensary once marijuana purchase and use was made legal in his state. The longest period Applicant had gone without using marijuana was six months during the time he was in graduate school from 1994 to 1996. (Government Exhibit 1 at Section 23, and Exhibit 2; Tr. 19-25, 30, 36.)

1.c. Applicant denied that he stated in an interview in April 2017 that he intended to continue to use marijuana. Applicant stated that he would not use marijuana in the future if he received national security eligibility for a security clearance. Applicant testified that he stopped using marijuana after he received the SOR in December 2017, approximately five months before the hearing. However, he indicated that he would continue marijuana use if he was turned down for national security eligibility, since he saw nothing wrong with marijuana use. (Government Exhibit 2; Tr. 31-35, 38.)

Applicant testified that his employer has a zero-tolerance policy for drug use, including marijuana. That policy has been in effect the entire time he worked there. Despite his failure to follow his company's drug use policy, Applicant stated that he was otherwise trustworthy and followed his company's policies and procedures. (Tr. 28-29, 36-37, 39-45.)

Policies

When evaluating an applicant's national security eligibility for a security clearance, the administrative judge must consider the adjudicative guidelines. In addition to brief introductory explanations for each guideline, the adjudicative guidelines (AG) list potentially disqualifying conditions and mitigating conditions, which are to be used in evaluating an applicant's national security eligibility.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in AG ¶ 2 describing the adjudicative process. The administrative judge's overarching adjudicative goal is a fair, impartial, and commonsense decision. The entire process is a conscientious scrutiny of applicable guidelines in the context of a number of variables known as the whole-person concept. The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires, "Any doubt concerning personnel being considered for national security eligibility will be resolved in favor of the national security." In reaching this decision, I have drawn only those conclusions that are reasonable, logical, and based on the evidence contained in the record. I have not drawn inferences based on mere speculation or conjecture.

Directive ¶ E3.1.14, requires the Government to present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, "The applicant is responsible for presenting witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by the applicant or proven by Department Counsel, and has the ultimate burden of persuasion as to obtaining a favorable clearance decision."

A person who seeks access to classified information enters into a fiduciary relationship with the Government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The Government reposes a high degree of trust and confidence in individuals to whom it grants national security eligibility. Decisions include, by necessity, consideration of the possible risk the applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified or sensitive information. Finally, as emphasized in Section 7 of Executive Order 10865, "Any determination under this order adverse to an applicant shall be a determination in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned." See *also* Executive Order 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information.)

Analysis

Paragraph 1 (Guideline H – Drug Involvement and Substance Misuse)

The security concern relating to Drug Involvement and Substance Misuse is set forth in AG ¶ 24:

The illegal use of controlled substances, to include the misuse of prescription and non-prescription drugs, and the use of other substances that cause physical or mental impairment or are used in a manner inconsistent with their intended purpose can raise questions about an individual's reliability and trustworthiness, both because such behavior may lead to physical or psychological impairment and because it raises questions about a person's ability or willingness to comply with laws, rules, and regulations. *Controlled substance* means any "controlled substance" as defined in 21 U.S.C. §802. *Substance misuse* is the generic term adopted in this guideline to describe any of the behaviors listed above.

I have examined the disqualifying conditions under AG ¶ 25 and especially considered the following:

- (a) any substance misuse (see above definition);
- (c) illegal possession of a controlled substance, including cultivation, processing, manufacture, purchase, sale, or distribution, or possession of drug paraphernalia; and
- (g) expressed intent to continue drug involvement and substance misuse, or failure to clearly and convincingly commit to discontinue such misuse.

Applicant has a history of purchasing and using illegal drugs. Applicant repeatedly used marijuana between 1990 and 2017. He only stopped using the drug because he was applying for a security clearance. His statement that he would discontinue drug involvement was not unequivocal, clear, or convincing.

The following mitigating conditions under AG ¶ 26 have also been considered:

- (a) the behavior happened so long ago, was so infrequent, or happened under such circumstances that it is unlikely to recur or does not cast doubt on the individual's current reliability, trustworthiness, or good judgment; and

(b) the individual acknowledges his or her drug-involvement and substance misuse, provides evidence of actions taken to overcome this problem, and has established a pattern of abstinence, including, but not limited to:

- (1) disassociation from drug-using associates and contacts;
- (2) changing or avoiding the environment where drugs were used; and
- (3) providing a signed statement of intent to abstain from all drug involvement and substance misuse, acknowledging that any future involvement or misuse is grounds for revocation of national security eligibility.

Applicant had not used marijuana for five months as of the date of the hearing. That is too short a time to demonstrate that he will not return to marijuana use in the future. Applicant argued that marijuana was not an important part of his life, yet he was a constant user of the drug for approximately 27 years, purchasing it during that entire time. Eventually Applicant obtained a medical marijuana card to make purchasing easier. It is also telling that he has violated a company rule against drug use during the entire time of his employment. There is little to no evidence, other than his self-serving testimony, that he will not return to drug use in the future if granted national security eligibility. Applicant has not met his burden of persuasion to mitigate concerns arising from his lengthy history of drug involvement. This allegation is found against Applicant.

Whole-Person Concept

Under the whole-person concept, the administrative judge must evaluate an applicant's eligibility for a security clearance by considering the totality of the applicant's conduct and all relevant circumstances. The administrative judge should consider the nine adjudicative process factors listed at AG ¶ 2(d):

- (1) the nature, extent, and seriousness of the conduct;
- (2) the circumstances surrounding the conduct, to include knowledgeable participation;
- (3) the frequency and recency of the conduct;
- (4) the individual's age and maturity at the time of the conduct;
- (5) the extent to which participation is voluntary;
- (6) the presence or absence of rehabilitation and other permanent behavioral changes;
- (7) the motivation for the conduct;
- (8) the potential for pressure, coercion, exploitation, or duress; and
- (9) the likelihood of continuation or recurrence.

Under AG ¶ 2(c), the ultimate determination of whether to grant national security eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole-person concept.

I considered the potentially disqualifying and mitigating conditions in light of all pertinent facts and circumstances surrounding this case. Applicant has not mitigated the security concerns resulting from his long-term drug involvement. His expressed intention to discontinue drug abuse if required to obtain security clearance eligibility lacks credibility, in light of his knowing and extensive violation of his employer's zero-tolerance policy towards drug abuse. Overall, the record evidence creates substantial doubt as to Applicant's present suitability for national security eligibility and a security clearance.

Formal Findings

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by ¶ E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline H:	AGAINST APPLICANT
Subparagraph 1.a:	Against Applicant
Subparagraph 1.b:	Against Applicant
Subparagraph 1.c:	Against Applicant

Conclusion

In light of all of the circumstances presented by the record in this case, it is not clearly consistent with the national interest to grant or continue Applicant's national security eligibility for a security clearance. Eligibility for access to classified information is denied.

WILFORD H. ROSS
Administrative Judge